Kerajaan Malaysia v Ekran Bhd

HIGH COURT (KUCHING) — SUIT NO 22–84 OF 2003-III(II)
LAU BEE LAN J
7 NOVEMBER 2005

Civil Procedure — Stay of proceedings — Application for — Pending appeal to the High Court — Power of the High Court to grant stay — Factors to be considered — Whether Deciding Order of the Special Commissioners of Income Tax was not final and conclusive — Whether plaintiff had a right of further appeal — Whether there was special circumstances warranting stay

The plaintiff filed an application for summary judgment pursuant to O 14 Rules of the High Court 1980 ('the RHC'). The plaintiff obtained the summary judgment for, inter alia: (i) the sum of RM25,036,323.98; (ii) interest 8% pa from date of judgment till date of realisation. The defendant filed a notice of appeal to the judge in chambers against the decision of the Deputy Registrar ordering summary judgment be given to the plaintiff. The defendant filed a stay application for a stay of proceedings pending the hearing and disposal of the appeal by the defendant before the Special Commissioners of Income Tax. The Special Commissioners of Income Tax decided in favour of the defendant and the deciding order stated that: (i) the sum amounting to RM210.6m for Year of Assessment 1997 is not taxable; (ii) the defendant's appeal be allowed; and (iii) the Notice of Assessment related to the appeal be amended consistent with the deciding order. The plaintiff appealed against the decision of the Special Commissioners of Income Tax at the High Court. The defendant withdrew the stay application. The plaintiff applied, inter alia, for a stay of all proceedings pending the hearing and disposal of the appeal by the plaintiff essentially upon the following grounds: (i) the plaintiff had lodged an appeal before the High Court against the Special Commissioners of Income Tax's decision; (ii) to stay all further proceedings until the disposal of the said appeal to prevent the appeal be rendered nugatory; and (iii) to ensure that the judgment granted under the O 14 application be not rendered futile.

Held:

(1) The factors to be considered in determining an application for stay of proceedings pending appeal would be the same as in the approach taken with respect to an application for stay of execution pending appeal as the effect therein is the same.

(2) The deciding order was an order made pursuant to sub-para 26(a) of the Sch 5 of the Income Tax Act 1967 ('the Act') wherein the Special Commissioners of Income Tax had directed that appropriate amendments be made in respect of the Notice of Assessment for Year 1997. Therefore, by virtue of para 34 of

Sch 5 of the Act, it was a matter which can be taken up on appeal by the plaintiff and which the plaintiff did. Since the plaintiff has a right of further appeal, the deciding order of the Special Commissioners of Income Tax was not final and conclusive.

(3) There was a right of further appeal from the decision of the special commissioners and that in the event of a conflict of decision between the Special Commissioners of Income Tax and the order of summary judgment, the former's decision will override the latter's decision. The said words 'unless reverted on further appeal' in the Act becomes significant because earlier the court has made a finding that the deciding order of the Special Commissioners of Income Tax is not final and conclusive, to reiterate, since the plaintiff has a right of further appeal.

(4) The issue of limitation was a point which the Court ought to take cognisance of so as to ensure that the plaintiffs appeal will not be rendered nugatory and this factor constitutes special circumstance as enunciated in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257.

[Bahasa Malaysia summary

Plaintif telah memohon untuk penghakiman terus berdasarkan kepada A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif telah memperolehi penghakiman terus, antara lain, untuk: (i) jumlah RM25,036,323.98; (ii) faedah 8% setahun dari tarikh penghakiman sehingga tarikh realisasi. Defendan telah memfailkan satu notis rayuan kepada hakim dalam kamar terhadap keputusan timbalan pendaftar yang memerintahkan penghakiman terus diberikan kepada plaintif. Defendan telah memfailkan penggantungan prosiding sementara menunggu perbicaraan rayuan di hadapan Pesuruhjaya Khas Cukai Pendapatan. Pesuruhjaya Khas Cukai Pendapatan telah membuat keputusan memihak kepada defendan dan perintah keputusan menyatakan bahawa: (i) jumlah RM210.6j untuk Tahun Taksiran 1997 adalah tidak bercukai; (ii) rayuan defendan di ikuti; dan (iii) notis taksiran yang berkenaan dengan rayuan tersebut dipinda menjadi konsisten dengan Perintah Keputusan tersebut. Plaintif telah membuat rayuan terhadap keputusan Pesuruhjaya Khas Cukai Pendapatan di Mahkamah Tinggi. Defendan telah menarik balik permohonan penggantungan. Plaintif telah memohon, antara lain, untuk penggantungan kesemua prosiding sementara menunggu perbicaraan dan penentuan rayuan oleh plaintif terutamanya atas dasar-dasar berikut: (i) plaintif telah membuat rayuan di hadapan Mahkamah Tinggi terhadap keputusan Pesuruhjaya Khas Cukai Pendapatan; (ii) untuk penggantungan prosiding seterusnya sehingga penentuan rayuan tersebut untuk mengelakkan rayuan tersebut menjadi tidak berguna dan; (iii) untuk memastikan bahawa penghakiman yang diberikan di bawah permohonan A 14 tidak menjadi sia-sia.

Diputuskan:

(1) Fakta-Fakta yang perlu diambil kira di dalam menentukan sesuatu permohonan untuk penggantungan prosiding sementara menunggu rayuan

adalah sama seperti pendekatan yang di ambil berkenaan permohonan untuk penggantungan pelaksanaan sementara menunggu rayuan kerana kesan daripadanya adalah sama.

(2) Perintah keputusan adalah suatu perintah yang buat di bawah sub-perenggan 26(a) Jadual 5 Akta Cukai Pendapatan 1967 ('Akta tersebut') di mana Pesuruhjaya Khas Cukai Pendapatan telah mengarahkan supaya pindaan-pindaan yang bersesuaian dibuat berkenaan Notis Taksiran untuk tahun 1997. Oleh itu, berdasarkan perenggan 34 Jadual 5 Akta tersebut, ia adalah suatu perkara yang boleh dibawa untuk rayuan oleh plaintif, yang mana plaintif telah lakukan. Oleh kerana plaintif mempunyai hak untuk membuat rayuan seterusnya, perintah keputusan oleh Pesuruhjaya Khas Cukai Pendapatan bukanlah yang terakhir dan muktamad.

(3) Daripada keputusan Pesuruhjaya Khas Cukai Pendapatan, terdapat hak untuk membuat rayuan seterusnya dan sekiranya berlaku konflik di antara keputusan Pesuruhjaya Khas Cukai Pendapatan dan perintah penghakiman terus, keputusan Pesuruhjaya Khas Cukai Pendapatan seharusnya mengatasi keputusan perintah penghakiman terus. Perkataan–perkataan 'unless reverted on further appeal' dalam Akta tersebut akan menjadi penting kerana sebelum ini mahkamah telah mendapati bahawa perintah Keputusan Pesuruhjaya Khas Cukai Pendapatan bukanlah yang terakhir dan muktamad, diulangi, kerana plaintif mempunyai hak untuk membuat rayuan seterusnya.

(4) Isu had masa adalah perkara yang perlu diambil tahu oleh mahkamah supaya memastikan bahawa rayuan plaintif tidaklah menjadi tidak berguna dan fakta ini merupakan situasi khas seperti yang dinyatakan di dalam *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257.]

Notes

For cases on application for stay of proceedings, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5770–5794.

Cases referred to

Affin Bank Bhd Abdul v Tan Sri Kishu Tirathrai [2004] 3 MLJU 349

All Persons In Occupation Of the House and the Wooden Stores Erected On a Portion of Land Held Under Grant No 6977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd [1996] 4 MLJ 533 (refd)

Arumugam Pillai v Government of Malaysia [1976] 2 MLJ 72

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473

Comptroller of Income Tax, The v JKL [1961] 2 MLJ 109

Director General of Inland Revenue v Mamor Sdn Bhd [1982] 2 MLJ 169

Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd [2000] 6 MLJ 493; [2000] 1 CLJ 361 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281

Kerajaan Malaysia v Ong Kar Beau [2003] 6 MLJ 225

Kota Kinabalu Industries Sdn Bhd v Director General of Inland Revenue [1981] 2 MLJ 186

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (folld)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281
Paganelli Sdn Bhd v Care-Me Direct Sales Sdn Bhd [1999] 2 MLJ 464 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85
Serangoon Garden Estate Ltd v Ang Keng [1953] MLJ 116

Legislation referred to

Courts of Judicature Act 1964 s 73
Income Tax Act 1967 ss 91(1), (2), 97(1)(c)
Rules of the High Court 1980 O 14

Ashrina bte Ramzan Ali (Legal Officer, Inland Revenur Board Malaysia) for the plaintiff.
John Jussem (Battenberg & Talma Advocates) for the defendant.

Lau Bee Lan J:

BACKGROUND

[1] The plaintiff vide a summons in chambers dated 9 May 2005 (encl 30) applied, inter alia, for a stay of all proceedings pending the hearing and disposal of the appeal by the plaintiff essentially upon the following grounds:

(a) the plaintiff had lodged an appeal before the High Court judge, High Court Shah Alam against the Special Commissioners of Income Tax's decision given on 14 April 2005 in respect of the Year 1997 Assessment;

(b) to stay all further proceedings until the disposal of the said appeal to prevent the appeal be rendered nugatory; and

(c) to ensure that the judgment granted under the O 14 application be not rendered futile ('the plaintiff's application').

[2] The plaintiff's application is supported by the affidavit of Monica Sanyaw affirmed on 9 May 2005 (encl 35) and supplementary of the affidavit of the same dated 31 May 2005 (encl 32). The defendant opposed the plaintiff's application vides the affidavit in opposition I of Liew Chie Chung affirmed on 7 June 2005 (encl 34).

[3] Prior to the above plaintiff's application, the following is the chronology of events:

(a) Plaintiff filed application for summary judgment pursuant to O 14 of the Rules of the High Court 1980 ('the RHC') dated 21 June 2004 (encl 11).

(b) Plaintiff obtained summary judgment on 14 October 2004 for:

(i) the sum of RM25,036,323.98;

(ii) interest 8%pa from date of judgment till date of realisation; and

(iii) costs.

(c) Defendant filed a notice of appeal to judge in chambers dated 20 October against the decision of the deputy registrar given on 14 October 2004 ordering summary judgment be given to the plaintiff (encl 24).

(d) Defendant filed a stay application dated 17 December 2004 for a stay of proceedings pending the hearing and disposal of the appeal by the defendant before the Special Commissioners (encl 26).

(e) The Special Commissioners of Income Tax decided in favour of the defendant on 14 April 2005 and the deciding order (exh LCC-1) states:

(i) the sum amounting to RM210.6m for Year of Assessment 1997 is not taxable;

(ii) the defendant's appeal be allowed; and

(iii) the notice of assessment related to the appeal be amended consistent with the deciding order.

(f) Plaintiff appealed against the decision of the Special Commissioners Income Tax at Shah Alam High Court.

(g) Defendant withdrew the stay application (encl 26) on 4 August 2005, the date fixed for the hearing of the plaintiff's application (encl 30).

CONTENTIONS OF COUNSEL

[4] Basically, the plaintiffs contentions are as follows:

(a) The Special Commissioners of Income Tax's decision in respect of the Year of Assessment 1997 is not a final judgment as it has been appealed against by the plaintiff pursuant to s 971)(c) of the Income Tax Act 1967 (Act 53) ('the Act') read with para 34 of Sch 5 of the Act. Section 97(l)(c) states that there is no finality of the assessment until the said assessment has been determined by the appeal and there is no right of further appeal. Paragraph 34 of Sch 5 of the Act provides for the right of appeal to the High Court by way of case stated by any party to proceedings before the Special Commissioners of Income Tax against the deciding order made in that proceedings. Thus, the judgment granted under the O 14 application is still a valid judgment until all appeal has been exhausted.

(b) Section 106(3) of the Act states that the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased and therefore the court is restrained from questioning the merits of the case.

(c) The appeal against the decision of the Special Commissioners of Income Tax and the fact that the assessment is not final indicate that the plaintiff has special circumstances to warrant a stay of the proceedings.

(d) If the plaintiff is successful in its appeal which means that the assessment of the plaintiff is correct and it becomes a final assessment, the plaintiff has to come to the civil court to proceed on for execution which would be rendered nugatory if a stay of proceedings is not granted. (e) Plaintiff has merits in its appeal as there is ample evidence to prove that the receipt received by the defendants is revenue in nature as opposed to the capital receipt decided by Special Commissioners of Income Tax.

[5] The plaintiff counsel cited the following cases in support:

(a) *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493; [2000] 1 CLJ 361 — Headnote (2), (3;

(b) *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 (CA);

(c) *All Persons In Occupation Of the House and the Wooden Stores Erected On a Portion of Land Held Under Grant No 6977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd* [1996] 4 MLJ 533;

(d) *Paganelli Sdn Bhd v Care-Me Direct Sales Sdn Bhd* [1999] 2 MLJ 464.

[6] The defendant's contentions are essentially:

(a) the O 14 judgment should reflect the Special Commissioners of Income Tax's decision and/or should be set aside and/or considered null or void because the Special Commissioners of Income Tax's decision is final. If the O 14 judgment is to remain status quo the defendant will be highly prejudiced as the Special Commissioners of Income Tax's decision is considered redundant and the plaintiff could proceed with execution proceedings based on the O1 4 judgment;

(b) section 97(1)(c) of the Act provides the provision of finality without prejudice to the plaintiffs right to make additional assessment and as such the Special Commissioners of Income Tax's decision should become final;

(c) the O 14 judgment must reflect or be varied according to the Special Commissioners of Income Tax's decision;

(d) there are no merits in the plaintiffs appeal since the High Court is not allowed to consider the merits of the case by virtue of s 106(3) of the Act and the Special Commissioners of Income Tax are trier of facts and order of re-assessment has been made;

(e) there is no likelihood that the plaintiff will reimburse and/or refund the RM23m paid to the plaintiff in the event its appeal to the High Court is unsuccessful;

(f) in view of the above, the plaintiff has not shown special circumstances for the court to grant it a stay of proceedings.

[7] The defendant counsel cited the following authorities in support:

(a) Sections 97, 102(4), para 25 of Sch 5 of the Act;

(b) *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85;

(c) *Income Tax Case law of Malaysia & Singapore* Vol 1, 1984, pp 5–6;

(d) *The Comptroller of Income Tax v JKL* [1961] 2 MLJ 109;

(e) *Kerajaan Malaysia v Ong Kar Beau* [2003] 6 MLJ 225;

(f) *Kota Kinabalu Industries Sdn Bhd v Director General of Inland Revenue* [1981] 2 MLJ 186;

(g) *Director General of Inland Revenue v Mamor Sdn Bhd* [1982] 2 MLJ 169;

(h) *Punca Klasik Sdn*;

(i) *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257

(j) *Affin Bank Bhd Abdul v Tan Sri Kishu Tirathrai* [2004] 3 MLJU 349;

(k) *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281;

(l) *Kerajaan Malaysia v Dato Hj Ghani Gilong* [1995] 2 MLJ 119;

(m) *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473.

Findings

[8] Section 97 of the Act states:

(1) Where —

(a) …

(b) …

(c) *an assessment* has been *determined on appeal and there is no right of further appeal*; or

(d) …

the assessment as made, agreed to or *determined shall be final and conclusive for the purposes of this Act.*

(2) Nothing in subsection (1) shall prejudice the exercise of any power conferred on the Director General by section 91, 95 or 143.

(3) …

(Emphasis added.)

[9] Section 102(4) of the Act states: **A**

> Where an appeal is sent forward to the Special Commissioners pursuant to this section, the appeal shall be sent forward in the manner provided by Schedule 5 and that Schedule shall have effect for regulating the hearing and determination of the appeal and othenvise as provided therein. **B**

[10] Paragraph 23 of Sch 5 of the Act pertaining to 'deciding orders' reads:

> As soon as may be after completing the hearing of an appeal, the Special Commissioners shall give their decisions on the appeal in the form of an order which shall be known a deciding order *and which, subject to this Schedule, shall be final.* (Emphasis added.) **C**

[11] Paragraph 26 of Sch 5 of the Act pertaining to the effect of a deciding order provides:

> Subject to paragraphs 25 and 31, a deciding order shall either confirm or discharge the assessment to which the appeal relates or shall direct the Director General to amend the assessment; and where it directs amendment, the order shall — **D**
>
> (a) *specify the appropriate amendments;*
>
> (b) require the appropriate amendments to be determined by agreement between the parties or, failing agreement, by the Special Commissioners; **E**
>
> (c) specify some of the appropriate amendments and require the others to be so determined. (Emphasis added.)

[12] Paragraph 34 of Sch 5 of the Act reads: **F**

> *Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings* (including a deciding order made pursuant to subparagraph 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal/ (Emphasis added.) **G**

[13] By virtue of the provisions of the Act cited above, with regret I cannot agree with the submission of Mr John Jussem, the learned counsel for the Defendant that the deciding order dated 14 April 2005 (exh. LCC-1) ('the deciding order') is final and conclusive. The deciding order is in my view an order made pursuant to sub-para **H** 26(a) of the Sch 5 of the Act wherein the Special Commissioners of Income Tax had directed that appropriate amendments be made in respect of the Notice of Assessment for Year 1997. Therefore, by virtue of para 34 of Sch 5 of the Act, it is a matter which can be taken up on appeal by the plaintiff and which the plaintiff did. Since the plaintiff has a right of further appeal, I agree with Pn Ashrina Ali, learned **I** counsel for the plaintiff that the deciding order of the Special Commissioners of Income Tax is not final and conclusive.

[14] Mr John Jussem cited the case of *Ong Kar Beau* and submitted that where the defendant's appeal before the Special Commissioners was disposed off and a reduced notice of assessment reducing the tax was sent to the defendant, it is in the interest of justice that the summary judgment entered against the defendant be varied to correspond with the sum stipulated in the notice of reduced assessment. Puan Ashrina Ali submitted that the case of *Ong Kar Beau* can be distinguished because in that case, there was no further appeal from the Special Commissioners of Income Tax's decision and the assessment was final; no O 14 judgment has been entered yet and the plaintiff informed the court of the reduced amount and the court entered judgment on the reduced sum. With due respect to Pn Ashrina All, the facts of the case showed otherwise. Dato' Zaleha Zahari J (as she then was) held that the Senior Assistant Registrar was right in allowing the plaintiffs claim for summary judgment. Further, Her Ladyship at the end of the hearing of the appeal against the learned deputy registrar's decision took note that in the plaintiffs supplementary affidavit, the defendant's appeal had been disposed of by the Special Commissioners vide a deciding order, exh KM-1 and arising from that the plaintiff issued a notice of reduced assessment, exh K-2 consistent with the deciding order. Further, her Ladyship also noted the fact that from the deciding order, the defendant appealed against the Special Commissioners' decision and the appeal is by way of case stated to the High Court. However, having regard to this circumstances at the time of the decision of the appeal, she held that in the interest of justice, as the tax in the case had been reduced pursuant to the notice of reduced assessment, the judgment entered against the defendant is to be varied correspondingly. However, in the instant case, I find that the plaintiff has not issued a notice of reduced assessment following the deciding order made by the Special Commissioners of Income Tax but have instead lodged an appeal against the decision of the Special Commissioners of Income Tax. I would therefore hesitate to follow the decision in *Ong Kar Beau* to vary the summary judgment entered against the Defendant to correspond with the deciding order made by the Special Commissioners of Income Tax as urged upon me by Mr John Jussem.

[15] I am of the view that the factors to be considered in determining an application for stay of proceedings pending appeal would be the same as in the approach taken with respect to an application for stay of execution pending appeal as the effect therein is the same. It is not disputed that the power to grant stay of proceedings or execution pending appeal is a discretionary exercise of power premised on s 73 of the Courts of Judicature Act 1964 (see *Punca Klasik Sdn Bhd*).

[16] Based on the authorities cited by both learned counsel for the plaintiff and defendant, I am of the view that it suffices for me to refer to the Federal Court case of *Kosma Palm Oil Mill Sdn Bhd & Ors*. At this juncture, I would reiterate the pertinent passages in the aforesaid case pertaining to the approach to be taken with respect to an application for stay of execution pending appeal as highlighted by Mr John Jussem in his written submission (encl 35). His Lordship Augustine Paul JCA (as he then was) at pp 263G–264A opined:

The general rule is that an appeal shall not operate as a stay of execution unless the court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116 while commenting on the discretion to grant a stay:

> But it is a clear principle that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it.

This is a re-statement of the common law rule explained in *The Annot Lyle* (1886) 11 PD 114 where Lord Esher MR said at p 116:

> … that an appeal shall be no stay of proceedings except the court may so order. We are asked to depart from this rule, although it is admitted that there are no special circumstances in this case which afford a ground for so doing. If in any particular case there is a danger of the appellants not being repaid if their appeal is successful, either because the respondents are foreigners, or for other good reason, this must be shown by affidavit, and may form a ground for ordering a stay.

[17] At pp 266E–267B; F-G, his Lordship further said:

An appreciation of the meaning of the phrase 'special circumstances' may resolve the confusion. As Ian Chin JC (as he then was) said in *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514at p 521:

An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, viz:

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances, ft must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

The definition only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about.

The resultant matter for determination are the factors or reasons that may constitute special circumstances. Generally stated, they are circumstances which go to the enforcement of the judgment (see *Sarwari a/p Ainuddin v Abdul Aziz a/ Ainuddin* [2000] 5 MLJ 391). With regard to the specific factors that constitute special circumstances, I refer again to *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* where Ian Chin JC (ax he then was) said at pp 520–521:

> What, then, constitute special circumstances? It was said in *Mohamad Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126, at p 127, that:
>
> > One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

A …

Finally, in *Re Kong Thai Sawmill (Miri) Sdn Bhd, Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)*, Lee Hun Hoe CJ (Borneo) in writing for the Federal Court said in clear and lucid terms at p 132:

B > An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances. See *Wilson & Church (No 2)* (1879) 12 Ch D 454. Another example is that payment of a judgment debt would destroy the substratum of the appeal: *Metropolitan Real and General Property Trust Ltd v Slaters and Bodega Ltd* [1941] 1 All ER 310. However, an allegation on an appeal that there has been misdirection at the trial would not be sufficient to bring it within the special circumstances: *Monk v Bartram* (1891) 1QB 346.

C

[18] His Lordship at p 268B–C, also stated:

D > *It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances.* In other words, special circumstances is the genus of which nugatoriness is a species. *If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established.* Thus they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related. (Emphasis added.)

E

[19] Puan Ashrina Ali submitted that the plaintiff may not be allowed to re-assess or file an action in respect of the Year of Assessment 1997 because of the limitation of six years contained in s 91(1) of the Act. Mr John Jussem submitted that the plaintiff will not be prejudiced if a stay is not granted because the plaintiff is allowed to make amendment or re-assessment for Year of Assessment 1997. He cited the case of *Dato Hj Ghani Gilong* stating that the High Court has no power but only the Special Commissioners of Income Tax have the power to entertain a plea of limitation under s 91 of the Act and highlighted a passage of the dictum of Edgar Joseph FCJ (as he then was) at p 128 as follows:

F

G > For the sake of completeness, we must add that in a situation •where summary judgment has been entered against a taxpayer in proceedings by way of suit for the recovery of tax, and a stay of execution in respect thereof granted pending the final determination of an appeal before the special commissioners, and if in such appeal, a plea of limitation is successfully invoked by such taxpayer, then we are of the view that the result of such appeal before the special commissioners (*unless reversed on further appeal*), being in conflict with the order for summary judgment, must override the order for summary judgment. We say so because the special commissioners are the judges of the facts, and have the jurisdiction to consider not only a plea of limitation based on s 91(1) and (3) of the Act but also other issues such as whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, all of which are issues which the court in proceedings for recovery tax by suit is prohibited by s 106(3) of the Act from entertaining. (Emphasis added.)

H

I

[20] Learned counsel for defendant also cited the case of Chong Woo Yit submitting that even if the time period provided in s 91(2) of the Act is intended to be a limitation period, the Director General can still go beyond it if it would be

establish that a person has been negligent or committed fraud or wilful default. He also submitted that the plaintiff cannot raise the issue of limitation during submission because no such averments were made in any of the plaintiff's affidavits and the High Court has no power to entertain a plea of limitation as only the Special Commissioners of Income Tax can do so.

[21] With regret, I cannot agree with the submission of Mr John Jussem. Firstly, it is patently clear from the statement of claim and from the application for summary judgment under O 14 of the RHC that the Notice of Assessment issued was based on the Year of Assessment 1997.

[22] Secondly, in Chong Woo Yit, the SAR had granted leave to enter summary judgment for the amount claimed. On appeal in the High Court one of the defences raised was additional assessments made after a lapse of 12 years contravened s 91 of the Act and was statute barred. The then Supreme Court at p 474 referred to a passage in the Federal Court case of *Arumugam Pillai v Government of Malaysia* [1976] 2 MLJ 72:

> In our judgment, limitation as such does not apply to any proceedings by the government for the recovery of any tax. This -would seem clear from the proviso to s 33(1) of the Limitation Ordinance 1953. Reading s 91 of the Income Tax Act 1967 as a whole it would seem clear that, quite apart from any form of fraud, the words 'within 12 years after its expiration' are irrelevant where there has been any wilful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment.

[23] Thereafter the Supreme Court opined:

> We would agree that by virtue of the proviso to s 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the government for the recovery of any tax or interest thereon, although for the purposes of an assessment or additional assessment of tax under s 91 of the Income Tax Act 1967 not made in any year of assessment or -within 12 years after its expiration, the Revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection -with or in relation to tax for that year of assessment.

[24] Following the ratio decidi in *Chong Woo Yit*, it would be incumbent on the plaintiff to prove the existence of fraud or wilful default or negligence on the part of the defendant in connection with or in relation to tax for the Year of Assessment 1997 in order to enable the plaintiff to overcome the limitation period of six years as prescribed in s 91(1) of the Act. In fact, this point was conceded by the learned defendant's counsel. Hence, this factor goes to show that if the status quo is not maintained the plaintiff would be put in great difficulty as the odds would be against them in the event they are successful in their appeal. Hence, I find the argument of Pn Ashrina Ali on the prospect that the statute of limitation may set in has merit.

[25] Thirdly, with regard to the passage quoted by learned defence counsel from the case of *Dato Hj Ghani Gilong*, I do not disagree with his submission. But with due respect, the learned defence counsel, he has in my view, missed or omitted the vital words underscored above contained in parenthesis namely, '(unless reversed on further appeal)'. Here, I agree with Pn Ashrina Ali that the said words as underscored is significant because in my judgment, it indicates that there is a right of further appeal from the decision of the special commissioners and that in the event of a conflict of decision between the Special Commissioners of Income Tax and the order of summary judgment, the former's decision will override the latter's decision. The said words 'unless reverted on further appeal' becomes significant in this instant case because earlier the court has made a finding that the deciding order of the Special Commissioners of Income Tax is not final and conclusive, to reiterate, since the plaintiff has a right of further appeal.

[26] Fourthly, in my view the omission by the plaintiff to aver the issue of limitation in its affidavit is not fatal, more so that it pertains to a point of law which can be raised during submission as submitted by Pn Ashrina Ali.

[27] In the light of this, I would agree with Pn Ashrina Ali's contention that the issue of limitation is a point which the court ought to take cognisance of so as to ensure that the plaintiffs appeal will not be rendered nugatory and this factor constitutes special circumstance as enunciated in *Kosma Palm Oil Mill Sdn Bhd & Ors*.

[28] The defendant has also contended that the defendant is faced with the threat of execution if the O 14 judgment is allowed to stand since the plaintiff has not given any assurance that they would not do so. In response, the learned plaintiff counsel submitted that despite the absence of such guarantee in the affidavits, since the plaintiff themselves have appealed against the Special Commissioners of Income Tax's decision and further, the stay of proceedings application by the plaintiff is indicative that it is unlikely for plaintiff to execute. I agree with the learned plaintiff counsel that the further steps in the proceedings taken by the plaintiff is not consistent with the conduct of a plaintiff who intends to undertake execution proceedings. Hence, I find the fear of any impending execution proceedings against the defendant is allayed and there is no likelihood of there being any execution proceedings against the defendant.

[29] Finally, there is fear expressed by the defendant of non reimbursement or refund of the RM23m paid to the plaintiff in the event the appeal of the plaintiff to the High Court is unsuccessful. The learned counsel for the plaintiff submitted that such fear should not exist since the plaintiff is the Government of Malaysia. I find that the position taken by plaintiff counsel is logical and acceptable.

CONCLUSION

[30] In the circumstances, premised on all the aforesaid grounds, I allow order in terms of prayers (1) and (2) of the plaintiff's application dated 9 May 2005 (encl 30).

Order accordingly.

Reported by Peter Ling